Supreme Court, U. S.
FILED
DEC 30 1977
MICHAEL RODAK, JR., CLERK

No. 77-528

In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

PACIFICA FOUNDATION, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY

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PETITIONER'S REPLY

The Federal Communications Commission has asked this Court to grant its petition for a writ of certiorari so that the Court may resolve a federal question of paramount importance to the Commission, broadcast licensees and the public as viewer and listener. (Pet., p. 8.) In the decision reversed by the court of appeals, the Commission had sought to give meaning, for purposes of regulatory action, to the word "indecent" as it appears in a statute of Congress barring the utterance of "obscene, indecent, or profane language by means of radio communications * * *." 18 U.S.C. § 1464. Acting on a listener's complaint, the Commission had found that the deliberate broadcast in the early afternoon of a pre-recorded 12-minute comedy

monologue devoted almost entirely to the use of certain "filthy words" was indecent and subject to regulatory sanctions.[1] (Pet. App., pp. 63–92.) The Commission replies only to correct two erroneous impressions the respondent's opposition may have created and to restate briefly the reasons for granting the writ. Otherwise, the Commission rests on its petition and urges the Court to give particular attention to the dissenting opinion of Judge Leventhal in the court below. (Pet. App., pp. 43–57.)

1. The Pacifica Foundation, licensee of the station involved in this case and respondent in this Court, states in its opposition that the Commission had declared its broadcast of certain words to be a "violation of the Criminal Code" (Opp., p. 3) and to be "*per se* a crime" (Opp., p. 5). In fact, the Commission has neither the authority nor the inclination to conduct criminal proceedings leading to conviction and the imposition of criminal sanctions.[2] The Commission addressed the Pacifica matter solely as an exercise of its regulatory responsibility under Sections 312 and 503 of the Communications Act, 47 U.S.C. §§ 312 and 503, to require its licensee to respect the congressional prohibition against obscene and indecent language.[3] The FCC has not usurped the criminal jurisdiction of the courts, as Pacifica appears to suggest, and has not convicted Pacifica of a crime.

2. Pacifica also argues that the court of appeals was correct in not considering whether the language was indecent "as broadcast" because the FCC's order went beyond the particular

[1] 47 U.S.C. §§ 312(a)(6), 312(b)(2), 503(b)(1)(E). Although the Commission did not impose sanctions in this instance, it found that the material "as broadcast" was indecent. (Pet. App., p. 72.)

[2] In the analogous area of regulatory enforcement of the criminal prohibition against broadcast of lottery information, the courts have recognized that the FCC does not function as a criminal court when it applies substantive criminal prohibitions through regulatory action. See *American Broadcasting Co.* v. *United States*, 110 F. Supp. 374, 384 (S.D.N.Y. 1953), *aff'd*, 374 U.S. 284, 296 (1954).

[3] The Second Circuit has held that Section 312 imposes on the FCC "the duty to enforce" congressional policies embodied in criminal statutes and incorporated by reference into the regulatory Act. *New York State Broadcasters Ass'n* v. *United States*, 412 F. 2d 990, 995–97 (1969), *cert. denied*, 396 U.S. 1061 (1970).

case and established standards for judging whether broadcast material is indecent. (Opp., pp. 12–13.)[4] In fact, the Commission specifically limited its holding to the language "as broadcast" (Pet. App., p. 72), while taking the opportunity to issue a declaratory order for the guidance of the public and broadcast licensees. The Commission surely intended its order to provide guidance; but its holding extended only to the comedy monologue and should have been reviewed in that context. As Judge Leventhal pointed out in dissent, there is no constitutional impediment to an agency addressing such matters in the fashion of courts, "disposing of particular cases presented with an indication of underlying principles—so long as there is judicial review." (Pet. App., p. 53.) Both of the opinions below which reversed the FCC's decision failed to review the matter as one disposing of a particular case. As a result, both opinions broadly disabled the Commission to perform its statutory duty to take regulatory action against indecent broadcast material.[5]

3. The Commission urges grant of the writ because this case involves a federal question of paramount importance that should be resolved by this Court. Whether the question is

[4] Pacifica cites language from the concurring opinion of Chief Judge Bazelon in support of this position. (Opp., p. 13.) The opinion of Judge Tamm did not address the question whether the language "as broadcast" was indecent, but found that the standard for general application was overbroad. (Pet. App., pp. 7–18.) Judge Leventhal, in dissent, correctly reviewed only the Commission's holding that "the language as broadcast was indecent" (Pet. App., p. 45), and affirmed that holding without considering what the FCC might do in other circumstances that were not before it in this case and consequently were not before the court for review.

[5] See also, *United States* v. *Simpson*, 561 F. 2d 53, 60 (7th Cir. 1977), holding that "obscene" and "indecent" in Section 1464 "are to be read as a single proscription * * *." Although Pacifica is technically correct in stating that *Simpson* involved an application of Section 1464 "in a *non-broadcast* context" (Opp., p. 12n.12), the distinction between non-broadcast uses of radio and broadcast station operation would appear to make no difference for purposes of applying Section 1464. The effect of the decisions in *Simpson* and *Pacifica* is to erase the prohibition of "indecent" language from Section 1464 regardless of the class of station the licensee uses.

viewed as statutory or constitutional,[6] it plainly is important to the millions of viewers and listeners who depend upon radio and television for a substantial part of their news and information, to the licensees who operate radio and television stations,[7] and to the agency which regulates the licensees under the statutes in question.

As Judge Leventhal recognized, the Commission tried in its order to define "indecent" in terms of the considerations which have guided this Court's most recent decisions in the obscenity area:

> In the last analysis, the FCC's opinion on what is "indecent" stands as a functional equivalent to the Supreme Court's current "obscenity" ruling * * *, save for an adaptation to bridge the difference posed by the characteristics of radio presentation.

(Pet. App., p. 47.) The particular characteristics of radio on which the Commission—and Judge Leventhal—relied are its intrusiveness and pervasiveness, its ready availability to children and unconsenting adults, the scarcity of frequencies and

[6] A close reading of the opinions below reveals that there is no statement of a majority rationale. Judge Tamm found that the Commission's order violated Section 326 of the Communications Act, 47 U.S.C. § 326, and did not reach the constitutional issue. Chief Judge Bazelon agreed only "with the result reached by Judge Tamm" (Pet. App., p. 19), found that analysis of Section 326 did not "end the matter" (*id.*, p. 21), and rested his decision on the First Amendment (*id.*, pp. 19–42). Thus, it is no more accurate to state, as Pacifica does, that the holding was not constitutional (Opp., p. 14) than to assert, as the Commission does *not*, that the court of appeals made a constitutional ruling. Each judge in the majority apparently reached the same result for entirely different reasons. The character of the decision (constitutional or statutory) is not crucial, however, to this Court's consideration of petitions for writ of certiorari. If the case has decided "an important question of federal law which has not been, but should be, settled by this Court," the writ may be granted. Rule 19(1)(b) of the Rules of the Supreme Court.

[7] The Commission has assumed that licensees such as Pacifica, as well as viewers and listeners who might oppose the Commission's order, would benefit from authoritative resolution of the questions raised in this case. See *Eastern Educational Radio* (*WUHY-FM*), 24 FCC 2d 408, 415 (1970).

the consequent public obligations of licensees, and the potential for a flood of offensive material on the airwaves in the absence of regulation. This Court should decide whether those characteristics justify different standards for regulating speech in the area of obscenity and indecency.[8]

CONCLUSION

For the reasons stated above and in the petition for writ of certiorari, the Court should grant the writ and decide this important federal question.

Respectfully submitted,

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[8] The Court already has found that the First Amendment has a different application in broadcasting for some purposes. *Compare Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94 (1973), *with Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974). The Court also has recognized that the First Amendment may impose variable standards where the "well-being of children" provides a countervailing consideration. *Ginsberg* v. *New York,* 390 U.S. 629, 634–45 (1968). Finally, the Court has held that a householder need not have his privacy disturbed by unwanted and objectionable material, and that he does not have to take the risk that offensive material will come into the hands of his children in their own home before it can be stopped. *Rowan* v. *Post Office Department,* 397 U.S. 728, 738 (1970).

U.S. GOVERNMENT PRINTING OFFICE: 1977